

EXHIBIT B

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

3 JANE DOE 1, ET AL) Docket No. WA 16-CA-173 RP
4 vs.)
5 BAYLOR UNIVERSITY) Waco, Texas
6)
7) December 6, 2019

8
9 TRANSCRIPT OF STATUS CONFERENCE
10 BEFORE THE HONORABLE ANDREW W. AUSTIN

11 APPEARANCES:

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transcript produced by computer-aided transcription.

1 (Proceedings commence at 10:07 a.m.)

2 THE CLERK: The Court calls the following for a
3 status conference: 6:16-CV-173, Jane Doe 1 and Others vs.
4 Baylor University.

5 THE COURT: Counsel, if you want to make
6 introductions or announcements for the record, please.

7 MR. DUNN: Chad Dunn, Jim Dunnam and Eleeza
8 Johnson for the plaintiffs.

9 MS. SPRINGER: Julie Springer for Baylor.

10 THE COURT: You're outnumbered.

11 MS. SPRINGER: I am. And I do want to say that
12 Ms. Brown would have driven up, but I told her it was not
13 necessary.

14 THE COURT: Okay. Appreciate that.

15 And thank you for the short notice of your being
16 able to be here on short notice.

17 What I would like to do this morning is,
18 basically I've -- as I promised, I went back after the
19 hearing Wednesday, and I re-looked at a lot of things. I
20 looked at the pleadings that had been filed leading up to
21 the motions to compel pleadings, I should say, I guess,
22 and the related pleadings from the spring and summer that
23 led to the June and July hearings. I reread the
24 transcripts of the hearings. I reread the orders on --
25 for two purposes. Primarily on the Pepper Hamilton data

1 and what to do with the data that's at the third-party
2 vendor, and then, secondarily, to look at the appropriate
3 deadlines for the materials that had been ordered to be
4 produced by Judge Pitman's July order.

5 And having gone through all of that and kind of
6 reached conclusions on these things, I decided that the
7 most expeditious way to get my ruling out is right here
8 and now. So I'm going to explain basically, with the aid
9 of some documents that will be put in the record, that
10 it's just our copies of pages of pleadings and
11 transcripts, and explain my reasoning and then, make my
12 rulings on the record so we don't have to wait for Ms.
13 Young and I to write that up and let you guys move
14 forward.

15 So starting with the starting point on these
16 issues was -- and I don't know. You see that in front of
17 you? Yeah. You've got a flat screen. Good. That the
18 position that Baylor articulated Wednesday was that there
19 were two buckets, two categories of files that we needed
20 to be considered -- looking at that were in the
21 third-party vendor's hands. There was the Pepper
22 Hamilton -- what I think, Ms. Springer, you referred to as
23 the Pepper Hamilton law firm electronic files. The
24 investigative files is what I've also heard those referred
25 to. And then, secondly, that there were the Project BEAR

1 files, I think is the term used on Wednesday, which were
2 described as being made up of 2.4 million pages of
3 material, and that contained the material that Pepper
4 Hamilton had culled from the much larger set of all of the
5 data gathered by Pepper Hamilton from Baylor during its
6 investigation. And I think, as I recall, and I actually
7 did go back and listen to the audio of our hearing on
8 Wednesday, even though we don't have a transcript yet,
9 those were referred to as being on a hard drive that had
10 been just sitting at Pepper Hamilton's offices, which I
11 think, as we'll see, is actually not quite accurate.

12 So Baylor's position at -- on Wednesday was that
13 Judge Pitman -- that Baylor had argued to Judge Pitman in
14 June and July that Baylor should only have to address the
15 law firm files and not the bigger Project BEAR collection.
16 So my observations about that now and conclusions, first,
17 the claim that came from Wednesday's hearing that it was
18 clear that Judge Pitman had adopted Baylor's argument that
19 Pepper Hamilton only had to produce the log form file --
20 law firm files is not borne out by my review of all of
21 this material. If we can pull up the first slide.

22 In the plaintiffs' motion, which is what -- you
23 know, starting with, you know, what relief was being
24 requested by the plaintiff in the motion to compel, we can
25 go to the second page, that material sought that by the

1 plaintiff and the relief it requested was that the Court
2 should order Pepper Hamilton to do one of the following
3 things: Produce to the plaintiffs directly in electronic
4 form all of the materials that the subpoena asks for and
5 treat those as attorneys'-eyes-only and use clawback or
6 snapback procedure to deal with privilege.

7 Alternatively, Pepper Hamilton should have been
8 -- should be ordered to give those to a third-party vendor
9 for a deduplication process; and that then, once those
10 have -- the two data sets -- and, again, it was clear that
11 it was being requested, Baylor's produced documents to the
12 plaintiffs in this litigation, compare that against the
13 Pepper Hamilton and what I believed are -- is the culled
14 data that they had obtained out of the big data set,
15 compare those, see what's different, and then, Pepper
16 Hamilton would -- I'm sorry, that there would be
17 redactions or withholdings based on the prior orders in
18 the case, after which time, whatever was not -- had not
19 been previously produced by Baylor in this litigation
20 would go to the plaintiff.

21 Baylor -- if we can go to the next page -- in
22 their response, they op -- they opposed that relief. It
23 primarily said two things. Its primary argument was that
24 this was inconsistent with what Baylor -- what the
25 plaintiffs had agreed to do with regard to the Baylor

1 production; and that is, they had agreed in August 2017
2 that Baylor would only produce from the materials that had
3 actually been reviewed by Pepper. That is the search
4 results that Pepper had run on their own, gathered
5 materials from Baylor, and what that smaller data set was.
6 And that what the plaintiffs were asking here was to get
7 into the much, much bigger data set, and that was going to
8 be a lot more work, and that was inconsistent with what
9 all the parties had agreed to.

10 Separately, Baylor filed their motion for
11 protective order, as well, in response, the same date, and
12 in that, sought -- mostly that was about the other legal
13 matters, which I don't think are at issue today nor were
14 they on Wednesday. But among other things, the last bit
15 of relief on the protective order was to prohibit the
16 plaintiffs from seeking any discovery after June 15th,
17 2016 from Pepper Hamilton: and the reason for that and the
18 arguments in this brief were that we have already looked
19 at all of the investigative materials, we, Baylor, that
20 is, and we have looked at all of the Pepper Hamilton
21 culled material files, and we have produced 96 percent of
22 this, at least. There's a few things we're still working
23 on, but we've given them already everything up through
24 this June 15th, 2016 date. So why should we have to do to
25 -- do it all over again? And that was the request that

1 Baylor made.

2 Going back to the opposition on the motion to
3 compel, which is the next page, there were a description
4 of the documents. And this is just sort of a side note,
5 which is that one of the things I've struggled with for
6 the last few weeks, getting prepared for this and then,
7 through the hearing and then, up to today, is the multiple
8 descriptions we've received for the material that Pepper
9 Hamilton has and the responsive material from the Pepper
10 Hamilton subpoena. It's been a moving target as far as
11 the titles that were used, including the Project BEAR
12 files. That was not something I've seen anywhere before I
13 heard that on Wednesday.

14 But what was described by Baylor in the
15 opposition to the motion to compel were three categories
16 of documents, what is referred to as the Pepper Hamilton
17 collection, which as I understand it in this description
18 here on -- in the motion to compel response is the big
19 universe. It's the stuff that all of those Pepper
20 Hamilton employees and investigators went out and grabbed
21 from Baylor employees' cellphones and separate electronic
22 devices, that big, big universe of stuff.

23 The second category listed was the, quote,
24 unquote, general ESI production. That appears to be made
25 up of, I believe -- I'm not sure. What's described here

1 is -- this was collection that supplemented the Pepper
2 Hamilton collection is what it said here, by grabbing
3 stuff after Pepper Hamilton had finished its
4 investigation. And this was, I presume, gathered by the
5 Baylor team on this litigation. That would be Thompson
6 Horton and Weisbart Springer and whoever else has been
7 working on this. And that this is the material from which
8 Baylor did its production with the 64 custodians.

9 And then, third, they described the Pepper
10 Hamilton investigation materials collection, which appears
11 to be the materials that Pepper Hamilton itself generated
12 during its investigation on what I think we could call
13 matter two or what it called matter two. So that's what
14 Baylor said in its opposition.

15 At the hearing on June 17th -- this is the
16 transcript of that -- there were only two collections of
17 materials argued about by Baylor. The first -- and
18 they're set out here on -- what page is this? Page 7 of
19 the transcript, Ms. Springer's describing those as the
20 Pepper Hamilton collection and noting that it's separate
21 from what Ms. Ham -- Ms. Springer says is going to be the
22 Pepper Hamilton investigative materials.

23 This time, though, the description of the Pepper
24 Hamilton collection is, I think, different because the
25 description here is that it's a subset of all of the raw

1 data given by Baylor to Pepper Hamilton. They applied
2 search terms to the raw data. That generated the Pepper
3 Hamilton collection. I believe that's the same collection
4 that we were talking about on Wednesday. And you go on to
5 say, Ms. Springer, that the particular batch of
6 information is what has been -- that intensive work,
7 you've done all that work. We've done the FERPA
8 redactions, et cetera.

9 Later on, into page 14 of the hearing, you add to
10 the fact that in your production, Baylor's production in
11 this litigation, you've not only just relied on that data
12 set but -- the 2.4 million documents, but you also went
13 out and gathered documents directly from Pepper Hamilton
14 and described how you went to Cozen O'Connor, maybe
15 Thompson Horton did, and gathered all that material and,
16 again, went through that whole process of producing or
17 logging as privileged those materials.

18 And you, again, reiterate that on the next page
19 that this is -- investigative materials is separate from
20 the bigger collection and those are two different
21 categories. And you add on page 16 that you were
22 satisfied that as to the pre-June 15th timeframe, the
23 documents from Pepper Hamilton had been produced and I
24 take that -- took that to mean, and I take it to mean
25 today still, that you were describing that Baylor had --

1 in this litigation gone through those two different
2 categories of documents as described in this hearing,
3 logged them or produced them with some minor exceptions.

4 At this same hearing -- well, actually, if we go
5 one more page in. Go back. Yeah. There you go. And
6 that's on page 36 of the transcript later in the hearing,
7 again, Ms. Springer is indicating that the information
8 from the Pepper Hamilton collection postdating June 15th,
9 that's not been produced, and that's what you looked at to
10 see whether you could produce -- Baylor could produce that
11 within 60 days. No distinction's made there between the
12 investigative files and the bigger collection but -- and
13 that's where we maybe get some confusion. And I'll
14 certainly give you a chance to talk here but I want to --
15 this is kind of my order. So.

16 MS. SPRINGER: Understood.

17 THE COURT: Yeah. Thank you.

18 So at this hearing, Bill Cobb testify -- I guess
19 he didn't testify, but he described what -- and he did so
20 in some pretty specific detail, what Pepper Hamilton had
21 and what they were going to be tendering to the
22 third-party vendor. And this is how he described it and
23 I've summarized this, but it's in the transcript.

24 He first said there's a -- they used a file site
25 system iManage documents that were the documents of Pepper

1 Hamilton attorneys on this one database, which contained
2 about 11,000 documents that he described as being about
3 4.2 gigabytes. He said they also were -- there were
4 Mdrive files of the individual attorneys and timekeepers
5 who worked on this investigation that had been gathered
6 separately, and that was 12 zip drives with seven
7 gigabytes. Said there were SharePoint files, which are --
8 which is the shared database that multiple people can work
9 on the same documents at the same time, and those only had
10 427 files. There were some group calendars and other
11 shared documents, again, about half a gigabyte.

12 He said there were data rooms with data from
13 Baylor personnel, 547 files, seven data rooms, 1.3
14 gigabytes. And then, he said there were three databases
15 that are in the Relativity platform. The first was
16 documents that Pepper Hamilton had culled through its
17 searches of Baylor material, which I believe is what is
18 being referred to, Ms. Springer, by you as the Pepper
19 Hamilton collection. That is the big, big, big data set
20 that was reduced down by Pepper Hamilton search terms and
21 that Pepper Hamilton used for its work, about 282
22 gigabytes.

23 The matter two Pepper Hamilton documents he
24 refers to -- and he says, again, these are about 11,000
25 documents -- I think, are the same as item one above, the

1 file site thing, given the number of documents and
2 description, but a different file size of 8.6 gigabytes.
3 That, of course, could be because Relativity -- it's in
4 the Relativity platform, that might add a lot of data, I
5 don't know, but I'm sure there's some explanation for
6 that.

7 And then, finally, he referred to this box that
8 had been sitting in a work room, a Fed Ex box that was a
9 hard drive. The box had not even been opened, but they
10 opened it and determined it was every single document
11 Baylor had ever given Pepper Hamilton. He referred to it
12 as massive. They hadn't done anything with it. I think
13 that is the data that you meant -- that you were
14 referencing on Wednesday that was a hard drive that was in
15 a box, but it's actually not the culled material. It
16 sounds like, from his description, it was the bigger data
17 set that is what they started with before they got to
18 their narrower set, I believe. I'm not sure. This is his
19 description.

20 And then, finally, just in the -- earlier, there
21 had been a series of declarations filed by Pepper Hamilton
22 itself in its responsive documents that described the
23 process that it had gone through in transferring the
24 documents to Cozen O'Connor and the other things. But
25 there was a summary of this by Thompson & Horton's

1 attorney, Ms. McIntush, where she indicates how they went
2 through all of those investigative materials, how Baylor
3 has already gone through all of that, they've labeled
4 them. The vast majority of them are because they're
5 Pepper Hamilton's own work, the majority of it that
6 believes -- they believe to be work product or
7 attorney-client privileged, that they had logged that and
8 produced that.

9 And in fact, attached to this declaration is a
10 log of 43 or 44 pages, I believe, and it covers a
11 timeframe from the first date on that privilege log is
12 August the 27th of 2015, and the last date is May the 24th
13 of 2016, again, reflecting that this was the work that had
14 been done and produced through that June 15th, 2016 date,
15 in all likelihood.

16 We turn to Judge Pitman's order, and in that
17 order, among other things, he says that he's not going to
18 grant the motion for protective order, saying that Baylor
19 had not met its burden, and concludes that Pepper Hamilton
20 must produce all of the other matters -- again, I don't
21 think that's really anything that we need to fuss with --
22 but also, uses the date frame that goes all the way
23 through November 6th of 2017.

24 And remember going back in the motion for
25 protective order that Baylor had filed, one of the

1 requests was that Pepper Hamilton -- that the plaintiffs
2 not be permitted to get anything prior to June the 15th of
3 2016. Just rejects that with that timeframe. But more
4 specifically, if you look at the very end of his order,
5 this is when Judge Pitman says we're going to come back in
6 July, and I want the parties to be prepared to talk about
7 some things.

8 First, he says he wants to address this issue of
9 whether Pepper Hamilton can withhold materials prior to --
10 the stuff that you've already now -- the review and
11 logging of. Again, this is looking at Baylor's argument
12 that we shouldn't have to redo everything we've done up
13 through that June 15th, 2016 deadline on these two
14 categories, the Baylor material that Pepper Hamilton had
15 used search terms on and had culled down to 2.4 million
16 pages. And we shouldn't have to go through that all
17 again. We should only have to produce things after June
18 15th, 2016 out of these databases.

19 And then, he said on second, for those materials
20 that Baylor was arguing should have to be produced, how
21 should we go about doing it? And he had already suggested
22 the clawback procedure, had attached a proposed order on
23 that, and wanted to get input from Baylor, or anyone else,
24 I guess, for any proposed improvements by the parties.

25 We move forward to the July hearing, he heard

1 argument from both sides, including Mr. Weisbart's and
2 Baylor's argument that there should not be a clawback
3 order, that there should be a third-party vendor used.
4 And by the way, there's never any mention of a third-party
5 vendor by Baylor until this hearing. Prior to that, they
6 were arguing that they shouldn't have to be using a vendor
7 at all.

8 And in his order, Judge Pitman says, first,
9 Pepper Hamilton is ordered to produce all materials
10 responsive to the subpoena from that early January date.
11 He rejected the argument at this point that Baylor should
12 not -- or, I should say, Pepper Hamilton did not have to
13 even produce anything before that June 15th date.

14 Second, he ordered that, ironically, by September
15 9th, Baylor was to produce privilege logs for all of the
16 materials produced by Pepper Hamilton to the third-party
17 vendor and certify that the production was complete. And
18 noting that he was using that representation that 60 days
19 was a realistic deadline in adopting that deadline. And
20 he ordered that you all keep him informed on what's
21 happening with the retention of a vendor.

22 And there was an advisory filed that was a joint
23 advisory by the parties in October -- I'm sorry, September
24 the 6th, and this is joint and it indicates we're working
25 on it. We've got a vendor, they've got the material, and

1 then, it -- interestingly, this is what the joint parties
2 described as what was going to happen with that material,
3 which was, an amended deadline for Baylor to produce
4 and/or log the Pepper Hamilton material postdating June
5 15th, 2016, produced to the third-party vendor. Again, no
6 distinction made between different universes of documents.
7 Just everything after June 15th.

8 So that leads me to these conclusions. On the
9 files that Pepper Hamilton -- well, let me start with
10 this. I believe what has been delivered to Pepper
11 Hamilton -- by Pepper Hamilton to the third-party vendor
12 is everything that was described by Mr. Cobb, which I
13 think includes this hard drive that has the huge universe
14 of everything that I don't even know how many documents it
15 is -- he didn't know -- that were gathered by Pepper
16 Hamilton in its investigation. That's sitting on a hard
17 drive.

18 That there's also -- and I don't know if it's on
19 a hard drive or what form it was delivered to the
20 third-party vendor in, the materials that Pepper Hamilton,
21 using its search terms, spent most of its work on its
22 investigation using. And I believe that's the same
23 universe of data -- and Ms. McIntush's declaration
24 indicates this -- that Baylor actually uses that very same
25 data set as part of the material it looked at when it

1 produced material to the plaintiff in this litigation.

2 That was part of it that Baylor supplemented that
3 with its own -- or this litigation team did with its own
4 investigation in its own gathering of materials that
5 postdated the investigation by Pepper Hamilton. That
6 material, though, the culled material that Pepper Hamilton
7 used in its investigation, that was delivered to the
8 vendor. And then, Pepper Hamilton's own internal files,
9 the investigative materials have been produced to the
10 vendor.

11 I also -- it's clear from Judge Pitman's orders
12 that he heard the argument that Baylor made that, look,
13 we've gone through, we used the exact same data set that
14 Pepper Hamilton has given to the third-party vendor.
15 We've already -- we used that data set. We've been
16 through that data set. We have logged it, we have
17 produced it. We shouldn't have to do that again. And we
18 shouldn't even have to like compare that data set to what
19 we have produced to the plaintiff in this litigation
20 because we've been acting in good faith and, you know,
21 we've already been through that.

22 And he heard that argument, but he didn't accept
23 that last part. It's clear that -- and he says it on the
24 record, he says it in his order -- that there have been
25 problems and he thinks that justifies doing the

1 deduplication process that the plaintiffs were requesting
2 and that they reiterated on Wednesday.

3 And so, I read his order to say that. I think it
4 makes sense in the context of everything I've just
5 described, and I believe this is what is supposed to
6 happen with that material. The first step is that first
7 -- I mean, it's happened. Pepper Hamilton's to deliver
8 that data set of the culled material, the material to
9 which -- on which they applied search terms and the
10 results of that search to the third-party vendor. They
11 have it, they've logged it, I believe -- or, I mean,
12 Bates-labeled it and identified it.

13 That either Baylor or the plaintiffs, somebody is
14 -- needs to provide the third-party vendor with an
15 electronic copy of what has been produced to the
16 plaintiffs in this litigation from that data set. And
17 then, there needs to be a comparison made of deduplication
18 and an identification then of non-duplicates, things out
19 of that data set that have not yet been produced to the
20 plaintiff or logged as privileged by Baylor.

21 Now, my understanding is that that shouldn't be a
22 very big group, whatever it is -- you know, shouldn't be
23 -- of the non-duplicates because if Baylor, as indicated,
24 has already used that exact same data set, has been
25 through it exhaustively, has produced responsive materials

1 that aren't privileged to the plaintiff, have logged the
2 privileged material, presumably there's some nonresponsive
3 material in there that has not been produced and that the
4 non-duplicate materials should be small. It should be
5 primarily, I presume, the either privileged material that
6 had been logged or the nonresponsive material.

7 But once that -- the things that are not
8 duplicates are identified, we need to decide what happens
9 with that. Judge Pitman had proposed the clawback order
10 to expedite things, but Baylor has resisted that. So I
11 think that means that Baylor would then need to go through
12 whatever those non-duplicates are, produce or log them.
13 But it should -- it's not going back through the entire,
14 it shouldn't be, the whole 2.4 million documents. That's
15 already been done, and that should be captured by the
16 production and be -- those will be duplicates.

17 On the investigative files, it appears to me that
18 the only thing that needs to be done -- and I think this
19 is already understood by Baylor -- is to review the
20 post-June 15th, 2016 Pepper Hamilton investigative
21 documents, and do the review for responsiveness or
22 privilege and produce those documents. Those have never
23 been produced before. Those haven't been by either Baylor
24 or by Pepper Hamilton.

25 On the hard drive of the huge universe, I don't

1 believe plaintiff is asking that that be looked at at this
2 point. Am I correct on that, Mr. Dunn?

3 MR. DUNN: Well, we have been asking for it,
4 Judge, but for this discrete reason because we have
5 observed, over the course of the case, shifting
6 descriptions of the materials. We got to the point where
7 we said there ought to be some inspection on what this
8 hard drive is because we lack confidence in the
9 descriptions we've been given of what Pepper Hamilton has.

10 THE COURT: What I would propose at this point at
11 least is that that hard drive remain where it is with the
12 third-party vendor and nothing be done to it at this
13 point. No -- that we don't want to open that can of
14 worms. I don't want to open that can of worms right now.

15 MS. SPRINGER: Judge, may I please -- this is
16 very important. We do know exactly what was -- all the
17 parties know exactly what was delivered to Pepper Hamilton
18 now. And unfortunately, Pepper Hamilton didn't know what
19 they had and gave varying descriptions, including at the
20 hearing. And in a letter sent to the parties --

21 THE COURT: I'm already done. Can we --

22 MS. SPRINGER: Yeah. I just there is no --

23 THE COURT: -- I will hear you out. But whatever
24 that hard -- whatever that material is, if it's sitting in
25 a box, whatever it is, I don't think we -- wherever that

1 huge universe of what was gathered by Pepper Hamilton in
2 its investigation before it applied any search terms, I
3 think it should stay put. I don't want to start looking
4 at that all over again. That's the only point I'm making
5 right now. And I understand that you probably have some
6 very valuable information to share and I want to hear it.
7 But let me just get to the last part here and that's the
8 deadlines.

9 What do we do with the deadline that was coming
10 up for whenever the 10th is, what is that, Tuesday, and
11 the extension of that deadline? And I just want to --
12 again, this is to explain the statements I made on
13 Wednesday and I'm -- I'm still pretty much of the same
14 view about we need to work more quickly than what Baylor
15 has proposed and has requested.

16 If you look at as early as the June hearing, in
17 that hearing, this was the -- sort of the statement that,
18 look, for the things in the post-June 15th world, we,
19 Weisbart Springer, are taking the lead. We're going to
20 make sure that this gets done right. And you specifically
21 talk about the very same things you were talking about on
22 Wednesday. We need to narrow the scope of the search
23 terms. We need to narrow the custodians, and I'm going to
24 work with the plaintiffs' counsel to get that done. So
25 June 15th or 19th, I think this is, 17th, we're already

1 talking about that.

2 July comes, comes up again. And again, they're
3 saying, I think our ESI cutoff date's November 6th. We
4 sent a proposal. We've been consumed with this matter
5 right now in our schedules. We haven't gotten to it.
6 But, you know, we need to get those terms and custodians
7 worked out, and we need to reach agreement on that. So
8 we're talking about it in July.

9 And then, there was an advisory submitted in
10 October saying, we've gotten everything done. As far as
11 the -- what the Court ordered us, and then, indicating
12 that Baylor has begun the process of collecting additional
13 documents pursuant to the orders that had been entered in
14 June and July and October, and then, has also begun
15 collecting ESI related to the Jane Does 11 through 15,
16 their assailants and, again, notes that the parties are
17 currently negotiating and agreeing upon the search terms.

18 And then, we get to Wednesday's hearing, and I'm
19 told we can't meet this deadline because we haven't got
20 the search terms and the custodians identified, and until
21 we have those, I can't tell you how much time it's going
22 to take. So my frustration is that this has been an issue
23 clearly that needed to be decided and needed to be
24 resolved as early as June and now, in December, and no
25 progress at all. We're still at the point of, well, we

1 can't even start until -- and, you know, you probably are
2 both responsible for the lack of an agreement. I'm sure
3 you are.

4 But if the work that needs to be done is by
5 Baylor, if that's holding up the work, you need to come to
6 the Court a lot sooner than six months to get a ruling on
7 that. And I've already set up the process that we're
8 going to have something by the 17th of December, either
9 y'all have made that -- bridged that gap and gotten
10 agreement or I'm going to tell you what the search terms
11 and the custodians are.

12 But that just to give you the backdrop of my
13 frustration is, you know, that that can't work. I mean,
14 that's why we are three years down the road and no closer
15 to getting the documents done than we were two years ago
16 is, it's just pushback, pushback, pushback, rather than
17 forced to a decision.

18 All right. So that's my ruling about what I'm
19 ordering to be done. You want to clarify what actually is
20 in the third-party vendor and what Pepper Hamilton
21 delivered.

22 MS. SPRINGER: And, your Honor --

23 THE COURT: Ms. Springer.

24 MS. SPRINGER: What is in the new deadline, were
25 you going to?

1 THE COURT: I haven't given you one yet.

2 MS. SPRINGER: Okay.

3 THE COURT: I was expressing my frustration and
4 it's probably not going to be a date you like, but that
5 probably won't surprise you from everything I've said so
6 far. But I want to hear what you have to say on this. I
7 want to hear from both of you on those issues.

8 MS. SPRINGER: First of all, I anticipated this
9 issue might come up if you went back and reread the
10 transcript. Unfortunately, Pepper Hamilton's counsel was
11 not fully aware and had been giving conflicting and
12 inconsistent information about what Pepper Hamilton
13 actually had. It's reflected in the declarations they
14 filed ahead of time. And when Mr. Cobb stood up and read
15 in open court what he had, he was wrong. He subsequently
16 -- may I approach? He subsequently --

17 THE COURT: Give me a second. Just for the
18 record, the PDF that I've gone through here, put up on the
19 screen, I'm going to make that a Court Exhibit to today's
20 hearing so it can be part of the record. Go ahead.

21 MS. SPRINGER: So following the hearing.

22 THE COURT: And we're marking this as plaintiffs'
23 -- I'm sorry, Defendant's 1.

24 MS. SPRINGER: Following the hearing, July 8th,
25 when he actually found out what they had, he states in

1 this letter at the hearing that he described this
2 Relativity database containing approximately 282 gigabytes
3 of data, he also separately described a hard drive that
4 they had received. And he implied that the hard drive and
5 the 282 gigabyte Relativity database were separate and
6 distinct. And I suggested the hard drive may contain some
7 larger set of data from which the 282 gigabyte data set
8 was pulled. It does not.

9 So he clarified that on that list, the hard drive
10 was, in fact, the smaller set of materials that was pulled
11 from the larger universe.

12 THE COURT: Okay.

13 MS. SPRINGER: And that there was no electronic
14 copy of that 2.4 million pages. Subsequent to that, we
15 actually got from the vendor -- I mean, the materials were
16 delivered to --

17 THE COURT: Well, hang on. I'm sorry. Go back a
18 second. You just said there was no electronic copy of the
19 2.4 million pages?

20 MS. SPRINGER: That is correct at the time that
21 it was delivered. The very last paragraph, he states to
22 clarify.

23 THE COURT: He says it's a 282 gigabyte
24 Relativity database.

25 MS. SPRINGER: And the only copy of that

1 Relativity database in Pepper Hamilton's possession is the
2 version that Pepper Hamilton understands to be actually on
3 the hard drive, received from PWC in March 2017.

4 THE COURT: Okay.

5 MS. SPRINGER: So then --

6 THE COURT: Let me ask you now, then. Let's go
7 back, Danielle, can you go back to McIntush declaration?
8 So -- the last paragraph.

9 In that paragraph 8 of Ms. McIntush's
10 declaration, she states that Pepper Hamilton's e-discovery
11 vendor made available to Baylor the database of what I
12 have understood from that paragraph to mean that same 2.4
13 million-page culled file and that Baylor used that as part
14 of its documents that it was reviewing for production in
15 this litigation.

16 Is that correct, as far as you know?

17 MS. SPRINGER: Slightly. One, it's Baylor's
18 e-discovery vendor, that's Price Waterhouse, not -- it was
19 not Pepper Hamilton's. But yes, Judge Pitman ordered the
20 entirety of the 2.4 million produced or logged, and
21 nothing -- nothing's been withheld from that. It's either
22 been produced or logged.

23 THE COURT: Yeah. And that -- that was
24 transmitted in some electronic form to Baylor's
25 e-discovery vendor in this litigation.

1 MS. SPRINGER: That is correct. That is correct.

2 THE COURT: So I -- okay. So go on with what you
3 were saying about Mr. Cobb and the letter from July.

4 MS. SPRINGER: So that 2.4 million, though, that
5 database, which is only Baylor data, it's not any Pepper
6 Hamilton-created data --

7 THE COURT: Correct.

8 MS. SPRINGER: And it all cuts off at September
9 2015, so it all predates the June 15th, 2016.

10 THE COURT: Correct.

11 MS. SPRINGER: Because that's when they collected
12 the material. It only exists on that -- or existed on
13 that hard drive. So if --

14 THE COURT: That's where I keep -- you keep
15 saying that, but it also exists in Baylor's e-discovery
16 vendor.

17 MS. SPRINGER: Well, it does, yes, but I'm not --

18 THE COURT: The copy of it.

19 MS. SPRINGER: Now it does, correct.

20 THE COURT: Correct.

21 MS. SPRINGER: Yes.

22 THE COURT: Okay.

23 MS. SPRINGER: It does.

24 THE COURT: Okay.

25 MS. SPRINGER: It does.

1 THE COURT: Okay.

2 MS. SPRINGER: But I just want to be clear there
3 were two sets, a hard drive set and an electronic set of
4 that.

5 THE COURT: Fair enough.

6 MS. SPRINGER: As Mr. Cobb described. So now we
7 do know from what was transmitted. And again, we have
8 been communicating jointly with the vendor. And I
9 apologize. I don't -- I thought I had an extra copy of
10 this. I'm looking. But what was --

11 THE COURT: Make sure you just show a copy of it,
12 if you would, to Mr. Dunn. Mr. Dunn.

13 And can I, for purposes of this hearing.

14 MS. SPRINGER: Absolutely.

15 THE COURT: Can we make Defendant's 1 an exhibit
16 for this hearing?

17 MR. DUNN: No objection.

18 THE COURT: That will be admitted as Exhibit 1
19 of the defendant's. We'll make this one Exhibit 2. Any
20 objection to that, Mr. --

21 MR. DUNN: No, your Honor.

22 THE COURT: All right.

23 MS. SPRINGER: So we now know what the vendor
24 actually has. And what the vendor got were some loose
25 paper files, but then, it got the Relativity databases

1 that are reflected in that exhibit, Exhibit 2. And what
2 the vendor has done is, they took the hard drive and they
3 restored it, okay? They restored it into an electronic
4 database that does exist; it's there.

5 But one of the things -- so just clarifying on
6 what date is actually there. We don't need to worry about
7 this giant universe.

8 THE COURT: Okay.

9 MS. SPRINGER: It's not there.

10 THE COURT: And that is fine by me. As I said, I
11 don't think I want to go there, but at this point, there's
12 no reason to.

13 MS. SPRINGER: Yeah. On the deadline, the 60
14 days, when I reread this transcript, there is a
15 typographical error on page 36, which you put up on this
16 screen, wherein I'm talking about the 60 days.

17 THE COURT: This is the July -- or no, I'm sorry,
18 the June hearing?

19 MS. SPRINGER: The June hearing.

20 THE COURT: Okay.

21 MS. SPRINGER: You see the information outside
22 from the Pepper Hamilton collection, that was aside from
23 the Pepper Hamilton collection that postdates the June
24 15th. That's what we could do in 60 days. And I had
25 conferred with Pepper Hamilton's counsel about the amount

1 of data that would have to be reviewed and logged and felt
2 very confident that we could get it done in those 60 days.
3 So --

4 THE COURT: I knew that outside didn't make sense
5 to me and I understood that. But I'm not sure that that
6 is dispositive of what I've --

7 MS. SPRINGER: It's not but I just want --

8 THE COURT: -- said.

9 MS. SPRINGER: But I just want to be clear with
10 the Court that that representation that 60 days was
11 specific to the Pepper Hamilton investigative materials
12 aside from the Pepper Hamilton collection. Anything that
13 postdated, that was the representation -- and there was a
14 discussion even with Mr. Cobb where I was saying can we
15 date -- can we sort it by date range because that was the
16 first time I'd heard that description. And so, he said
17 yes.

18 When that joint advisory was filed and it said
19 produce and/or log materials that postdate the June 15th,
20 that was Baylor saying, we believe that is what our
21 obligations would be. Now, I'm hearing something today on
22 -- and I want to make sure I really understand it on this
23 deduplication process because, to me, that's a little
24 different than what we're doing with the investigative
25 materials. And so, our --

1 THE COURT: Yes, it is.

2 MS. SPRINGER: Are you -- and it would be Baylor
3 that would have to give the material because it is that
4 FERPA redactions, it has the privileged materials. So it
5 would have to be Baylor. But if what you're saying is,
6 all they need to do is account for anything in there that
7 has not at all been either produced or logged, I think we
8 might be able to do that.

9 Now, I will tell you, when we picked this vendor,
10 we discussed this vendor. It was not a very -- in my
11 opinion, it is not a very sophisticated vendor. And I
12 remember distinctly, we thought that it was just going to
13 be doing the Bates labeling, and the material would then
14 be turned back to Baylor for any sort of accounting. It
15 has taken us four months -- your Honor noted when we filed
16 the advisory. It has taken this vendor for months just to
17 Bates-label this material.

18 And so, Price Waterhouse is a big firm, and it's
19 going to be a lot more efficient if what we're trying to
20 do to push this thing forward to get it done quickly is to
21 turn it to them, and then, they account for it and dedup
22 it. They're going to be able to do it much more quickly.

23 THE COURT: Mr. Dunn.

24 MR. DUNNAM: My recollection specifically because
25 this was an issue we were interested in -- this was an

1 issue that we were interested in from the start because
2 our -- as Mr. Dunn said, we've had issues with competence
3 and materials going back two years. Things redacted in
4 white, for example, that we happen to have a client that
5 accidentally has a copy, things that we think we have some
6 reason for some concern.

7 Early on, the issue of deduplication by the
8 third-party vendor was something that was discussed with
9 the vendor. I could probably go back and get you a date,
10 but I remember specifically myself talking to the
11 gentleman who was a technical expert. I want to
12 understand, if you get the unredacted materials, can you
13 do an exact match? Can your system do it? This was a --
14 you know, a 15-minute discussion we had on the phone. Ms.
15 Johnson was on it, too. So the idea that this vendor was
16 not going to be involved in duplication -- deduplication
17 from the start is something that we would disagree with.
18 There's really no point in just using them as a Bates
19 labeler if that's all they're going to do.

20 The vendor assured us that they had these
21 abilities. We could talk, if you wanted to, and you
22 probably don't want to hear why it has taken so long. We
23 believe it's not a reflection on the vendor. We've think
24 it has to do with issues that we could discuss if you want
25 to talk about it.

1 THE COURT: Yeah. I understand what you're
2 saying, but I think that horse is -- the train's left the
3 station. The horse is out of the barn. Whatever bad
4 cliché you want to use. But the parties have agreed on
5 this third-party vendor. I don't want to start over with
6 trying to get to a different vendor. I understand it
7 might slow it down. You've given notice to that effect.

8 And -- but whoever does it, what I -- I think
9 we're all on the same page here is that those two
10 different data sets, the original unredacted materials
11 that Baylor had and the ones that were produced, I guess,
12 Pepper Hamilton had and those that were produced, let's
13 find out what the universe of non-duplicates is.

14 And like I said, it should be small. Every
15 representation that you've made about what's been done
16 with that material through that date is, it's been
17 thoroughly reviewed and unless there's something -- some
18 mistake or problem made that the universe of things that
19 would then be left over should be small.

20 MS. SPRINGER: Can I make one suggestion,
21 friendly suggestion? Because we're not going to have any
22 control over what the -- how quickly the vendor gets this
23 done. One of the things that has slowed down the process
24 is every communication with the vendor has to be blessed
25 and approved by the parties before we transmit the

1 instruction.

2 I would suggest that Price Waterhouse technical
3 people communicate directly with the third-party vendor.
4 They keep a log of those communications and just so the
5 plaintiffs aren't suspicious --

6 THE COURT: Let me cut through all of that. How
7 about we have Monday, the vendor bring a representative
8 here or get on the phone, and let's talk about it with the
9 parties and the vendor and me and figure out exactly what
10 needs to be done, how long it's going to take, and get it
11 done.

12 MS. SPRINGER: We could do that. My only concern
13 is, every time we've had to communicate about this data,
14 we've -- because it's been maintained and produced in a
15 way in Price Waterhouse's database for the comparison to
16 be made, it has to come -- there's text messages, for
17 instance. I'm not a tekkie, but there's text messages
18 that had to be loaded and fields and all sorts of things.

19 And so, maybe we can have the Price Waterhouse
20 person here, as well.

21 THE COURT: Y'all can bring whoever you want,
22 expert-wise, to consult with, but the goal is, let's not
23 slow it down. Let's speed it up. And I'm happy to be the
24 one to help speed it up. And sometimes it seems to me
25 that in many cases, even in criminal cases, it's amazing

1 the difference of what a defendant says to his attorney
2 when he's in court as opposed to what he says to him back
3 in the jail.

4 And similarly getting people in the courtroom
5 tend to sharpen their focus, let's just put it that way.
6 And I think let's do that. And if I have concerns after
7 what I hear and see from the vendor about their ability to
8 actually do this and they're treating it with enough
9 urgency, it will be apparent, I think, and we can then see
10 where we need to go with that.

11 MS. SPRINGER: I'm fine with it.

12 THE COURT: Okay.

13 MR. DUNN: I'd like to respond to this Cobb
14 issue.

15 THE COURT: Okay.

16 MR. DUNN: Now is an appropriate time.

17 THE COURT: Yeah. With -- so we are clear on the
18 order with regard to the Pepper Hamilton materials, what
19 we're going to do next is get the vendor in, figure out
20 how they're going to accomplish it.

21 MS. SPRINGER: The Pepper Hamilton collection.
22 The Project BEAR collection.

23 THE COURT: And I'm going to ask that we only
24 pick one name for this material. I don't care what it is.
25 But have an agreement that we all, all of us use whatever

1 name is it so that there's not this same confusion that
2 happens in the future.

3 MR. DUNN: I think the way to do that -- this
4 isn't going to work with labels because that's the issue I
5 want to raise. There's not -- what Ms. Springer's using
6 as a phrase, we still don't know what that is. So let me
7 start with this.

8 Walking into the courthouse this morning, we got
9 the monthly invoice by e-mail from the third-party vendor
10 and by the terms of -- I can't remember if it's an order
11 or an agreement, the vendor has to copy us on the invoices
12 that they're sending. And in it, it says that they have
13 about 1.8 gigabytes worth of material. Terabyte. No.
14 1.8 terabytes, that's right, of material.

15 THE COURT: I was going to say, if it's
16 gigabytes.

17 MR. DUNN: Sorry.

18 THE COURT: Something's gone awry.

19 MR. DUNN: It's written in gigabytes as
20 1,800-and-something.

21 THE COURT: Yeah. Okay.

22 MR. DUNN: And so, that doesn't match, right,
23 with the drive and the box that's two-point --

24 THE COURT: 208 gigabytes.

25 MR. DUNN: Right. And, well, they also got the

1 drive and the box, right, and they uploaded it. But the
2 numbers that we've all been given by everybody don't add
3 up to 1,800-and-something, okay? And so, it seems like
4 what -- you know, I don't know how to do it at this point,
5 but talking generally about what's under this can or
6 what's under that can is what's gotten us here now.

7 So it seems like maybe when we get the vendor
8 here, we can have the vendor inventory what it is that
9 they have, what makes up the 1.8. And one final comment
10 on that. If it is the case that what's on this hard drive
11 is the grand scheme of materials that was then culled from
12 using search terms by Pepper Hamilton, the result of which
13 we're supposedly going to get in the 282, then taking
14 Baylor's production and deduping it against that hard
15 drive should come up with more or less a perfect match,
16 right? And nothing more than that. We should see a list
17 of what's on that hard drive that isn't in the 282. And
18 we'll actually know the remainder that wasn't culled out
19 by Pepper Hamilton's search terms, and maybe we get into
20 that later or not. I understand your Honor's putting that
21 off to another day.

22 Be we think all the comparison should be to the
23 whole pile, especially since we don't have a straight
24 answer of what was given to them.

25 THE COURT: My concern with that is, as I

1 understand it -- and again, it may be misdescription. It
2 may be that we're on a snake hunt for something that
3 doesn't exist. But if this universe of, you know,
4 everything that Pepper Hamilton went and got during its
5 investigation, every cellphone, every device, every
6 laptop, every bit of data that they gathered from that, if
7 that exists still in a pristine form, if we dedup it
8 against what Baylor has produced to you, it could be a
9 huge universe of things that were never produced to you.
10 Because, as I understand it, what Pepper Hamilton says is
11 that they took that -- whatever that universe is, however
12 big that is, they did their search terms, and then, they
13 pretty much set it aside, and they just worked with the
14 2.4 million pages of documents that have been produced to
15 Baylor's e-discovery vendor and that Baylor has used as
16 the -- one of the main data sets to produce to y'all in
17 this litigation.

18 So those are the two that I think need to be
19 matched up to make sure that Baylor is -- you know, the
20 whole concern here is that Baylor has arguably not been
21 acting in good faith, or accurate, or whatever, in its
22 production to you from that data set.

23 I don't think there's evidence, I haven't heard
24 any, that Baylor ever even itself received back from
25 Pepper Hamilton the huge, big database.

1 MS. SPRINGER: Only as part of this discovery, we
2 -- the vendor. The vendor did. PWC.

3 THE COURT: Okay. So if that exists somewhere,
4 I'm not sure I want to start with that because I think
5 what it might do is -- and this is one of the other things
6 -- one of the other things I wanted to say today, what it
7 might do is create another huge data set that has not been
8 looked really at by anybody, and could set us back even
9 further if -- you know, at some point, we've gotta trust
10 somebody who's run some search terms on this data set that
11 they've captured the things that need to be looked at in
12 this litigation.

13 And my fear is that there's a whole lot of stuff
14 that when they went out and started grabbing devices and
15 phones and that doesn't relate to this litigation. And,
16 you know, I think one of the -- so the bigger point I
17 wanted to say that -- well, I'll go ahead and say it now.
18 I was going to say it later -- is I would urge the
19 plaintiffs to also look carefully at their requests and
20 their scope of this -- of their searches because that's
21 part of -- definitely driving part of the problems.

22 I mean, if we had an agreement to produce
23 directly to you and claw back, I wouldn't be as concerned
24 about that, but we don't have that agreement. And the
25 flip side of that means that then, we're relying on Baylor

1 to have to go through everything first, and that has been
2 slow.

3 So to the extent you can, without compromising
4 your clients' interests and your interests in litigation,
5 help that process, I would urge you to do that.

6 MR. DUNN: We'll absolutely take that to heart,
7 your Honor.

8 THE COURT: And I know you -- I mean, I'm not --
9 it's just, you know, we're going to have to work, all of
10 us, to figure out ways to move this forward. So.

11 MR. DUNN: Here's what -- here's the scene that
12 we -- that I, in particular, but I think all of us have
13 been looking at: Jury's in the box. Baylor has at
14 various times said this is the best blue-ribbon Pepper
15 Hamilton investigation anybody's ever done at the
16 university. At other times, they've said it's a disaster.
17 Their executives have said it was a mess, right? So there
18 are going to be witnesses who ultimately testify about the
19 quality of the Pepper Hamilton findings.

20 Because as the Court's probably aware of by now,
21 the regents issued and findings, many of which, you know,
22 in my opinion, preclude summary judgment, for example, in
23 this case. You have a finding by officeholders,
24 policymakers as to failures in Title IX. So I think
25 Baylor strategy, as I've seen up until now, is to attack

1 those findings. Well, the board was misinformed by Pepper
2 Hamilton. It shouldn't have concluded that it violated
3 all these policies.

4 And so, what Pepper Hamilton got from Baylor that
5 Baylor thought was important enough to hand over to them
6 and what Pepper Hamilton decided to cull out of it, I
7 think, is going to end up being an issue that shows up in
8 trial. That's the reason I raise it. But I've heard your
9 Honor, and we'll sit down and figure out what we can do to
10 comply with the orders.

11 THE COURT: Okay. I appreciate that. All right.

12 MS. SPRINGER: Your Honor, just to clarify, one
13 more time, we have another inventory that was provided to
14 all the parties.

15 THE COURT: Okay. Got it.

16 MS. SPRINGER: On the one back page, there's a
17 small entry that says the hard drive at the top. And you
18 see, it's got the 283 gig or --

19 THE COURT: Gigabytes.

20 MS. SPRINGER: Gigabytes. So this reference on
21 the invoice, I haven't looked at it today. We all know
22 that's what they have. This is part of their inventory
23 they gave us. And so, I just want to -- I want to make
24 that clear. There's not some big missing gap subset
25 there.

1 And as to the broader issue, Baylor's not
2 attacking the findings. I just need to be very clear with
3 that. We have not attacked -- in fact, we have embraced
4 them, and it's been part of what Baylor has been doing
5 implementing them in the last several years. So I just
6 need to correct that statement for the record.

7 And I embrace having the vendors come, and we
8 will have somebody from PWC come, because these were very
9 technical with text messages, and there are slip sheets,
10 and we could give you a notebook of the communications
11 that have gone back just to be able to Bates-label it.
12 So.

13 THE COURT: Okay.

14 MR. DUNN: We have one another issue, your Honor.
15 So I don't want to use a trigger word, so to speak, but
16 what we're calling the Pepper Hamilton report, all right,
17 we had suggested during the summer that the Court review
18 that in camera.

19 THE COURT: Uh-huh.

20 MR. DUNN: It's going to end up being a central
21 issue in the case. And in the interest of getting things
22 moving along, we suggest it get filed with your Honor so
23 you have some sense of what this report looks like, or
24 whatever it is, the PowerPoint, hyperlink to individual
25 documents. And the reason we think that makes sense to do

1 now is for a variety of reasons, but on this point is, we
2 think it will help the Court understand better what it is
3 Pepper Hamilton culled from, what -- it may even describe
4 the search terms they use, otherwise, describe their
5 process. It will only be the Court receiving it, so we
6 won't have it still.

7 THE COURT: So as I recall at the hearing on
8 Wednesday, Ms. Brown said that they had listed that
9 somewhere on a privilege log.

10 MR. DUNN: Which we still have.

11 THE COURT: Identified the PowerPoint?

12 MS. SPRINGER: No. It has been -- it is there,
13 PowerPoint. It's been identified for over --

14 THE COURT: So would you make sure that, Ms.
15 Springer, that Mr. Dunn knows, or Ms. Johnson, or whoever
16 needs to know this, exactly where that is in the privilege
17 log?

18 MS. SPRINGER: Yes.

19 THE COURT: And then, what I would suggest you do
20 is, let's keep everything as per the process of you look
21 at that entry, I don't think it's going to make -- it will
22 be a very quick conversation, I have a feeling, about
23 whether there's any agreement about whether anything in
24 there could be produced without the Court intervention and
25 then, make a motion to -- for that to be produced.

1 The only grounds I have to review something in
2 camera is if it's being sought as not being privileged, or
3 challenged as not being work product, if that's the claim
4 that's been made by Baylor. So that needs to be
5 challenged for me to even have a reason to look at it.
6 Okay.

7 So I am going to remain -- until we -- let's do
8 these two things. I want to resolve the search terms and
9 custodians and talk to the vendor before I set this
10 deadline of when you need to produce things by, but it's
11 probably going to be, at the latest, in February and
12 probably maybe less than that. So that's 60 days -- I'm
13 thinking 60 days when we get these issues resolved.

14 If in the deduplication process, we find some
15 huge universe of surprises, we'll have to revisit things.
16 But I'm anticipating, based on everything I've read and
17 understood and the representations made, that the universe
18 of non-duplicates is not going to be so huge that the work
19 that needs to be done to get that produced or logged is
20 going to be massive.

21 MS. SPRINGER: Your Honor, I mean, ideally
22 there's just going to be nothing. It's just going to be
23 accounted for. Now, I'm looking at that as a different
24 deadline because the deadline -- December 10th deadline
25 was for complete production of everything in response to

1 106 requests.

2 THE COURT: Yes.

3 MS. SPRINGER: Okay. And --

4 THE COURT: But the concern you have with that
5 was really the dates from June 15th to February -- or, I'm
6 sorry, to November, whatever that end date is that the new
7 material and how much --

8 MS. SPRINGER: Absolutely.

9 THE COURT: How much quantity that is.

10 MS. SPRINGER: But the December 10 deadline is
11 much broader than what we're talking about here.

12 THE COURT: I understood. I understand.

13 MS. SPRINGER: Okay. We have no problem with --
14 in fact, we've sent a draft e-mail already over to
15 plaintiffs to get it to the vendor to have it transmitted,
16 the post-June 15th Pepper Hamilton materials, so we can
17 get that done. So we have no problem with that.

18 THE COURT: And to be clear, that means not just
19 Pepper Hamilton's own internal documents but, also,
20 whatever postdates June 15th in the culled documents,
21 something that we need to give a name to that we know what
22 we're talking about.

23 MS. SPRINGER: But there's nothing that's going
24 to be there in the culled documents because they all
25 predate June 15, 2016. But if there's anything -- what I

1 think I'm hearing from you is, if there's just anything
2 that shows up that isn't accounted for, that's not a
3 problem. But the December 10th deadline is much broader
4 than that subset, and so, I just -- I guess I just want to
5 make sure we're on the same page with you.

6 THE COURT: We are. But as I said, my
7 frustration is, it's been -- that's been the focus for
8 long time, and we're six months down the road and we're no
9 closer to --

10 MS. SPRINGER: I -- I hear you. I just want to
11 make sure I'm on the same page as which deadlines we're
12 talking about right now.

13 THE COURT: Yeah. And I haven't set any deadline
14 for the dedup process. I want to hear from the vendor,
15 see what they say it's going to take. But I do want to
16 set deadlines on that vendor so that we know we're moving
17 forward.

18 MS. SPRINGER: Right. And my deadline -- "my"
19 being Baylor, the investigative materials is 60 days and
20 we're on it. So.

21 THE COURT: All right. Anything else we need to
22 address this morning?

23 MR. DUNN: Nothing, your Honor.

24 MR. DUNNAM: Would you care for an update of just
25 a few things from Wednesday?

1 THE COURT: Sure. And one of the things I do
2 intend to do, we have an order almost ready to be entered
3 today that mainly is focused on the third-party discovery
4 that will give a brief deadline for any of those third
5 parties if they want to update any of the material that's
6 already been submitted, do so by this date. A week later,
7 responses by anybody who wants to update their side of
8 things, and then, I'll decide if I can rule on it, any of
9 those, or we need to have hearings.

10 MR. DUNNAM: Yeah. This is not really -- I mean,
11 I just want to let you know, I've talked to Mr. Nesbitt.
12 I think we'll either have or have -- I'm -- we drafted a
13 letter to Mr. Lanier about Judge Starr. We think we have
14 an understanding of what, if anything, we need to do with
15 Mr. Alejandro. I just want to let you know --

16 THE COURT: Excellent.

17 MR. DUNNAM: -- we've moved on that. We did
18 send, last night -- Ms. Springer probably hasn't had a
19 chance to look at it. We've removed 11 search terms from,
20 you know, what was disagreed upon. One thing that, you
21 know, we would observe or see if we -- it could be done.
22 I understand these deadlines, but there have been
23 obviously agreed terms and agreed custodians for a long
24 time. And it seems like the fact that we had -- we still
25 have some disputed terms is holding up the production of

1 what we've all agreed on, right?

2 And so, we would suggest that why can't that
3 other stuff just go ahead and be produced if we've gotta
4 spend time arguing about some other terms and custodians,
5 okay, but let's not use that as a reason not to go ahead
6 and get what we've all agreed upon.

7 MS. SPRINGER: Can I address just a couple of
8 things? One, taking to heart what your Honor said on
9 Wednesday, one lawyer for each side, I really feel like
10 had I known this conference would be going in so many
11 different directions, I probably would have had somebody
12 else with me because this case has a lot of moving parts.

13 THE COURT: Right.

14 MS. SPRINGER: So if we're going to do that, I
15 want to have some way we can give notice when we're going
16 to go on certain issues. However, on the inside search
17 terms and this is merits, and we weren't going to be going
18 into merits, but I need to address it.

19 The old custodians and the old terms were picked
20 and agreed upon in the con -- back in 2017, when the only
21 issues predated June 15, 2016. The custodians, the
22 general counsel is a custodian. All of that made sense
23 back then because there was the waiver filed. There were
24 various things. But the waiver's just for things prior to
25 the issuance of the findings.

1 And so, now we're in a different era. And so,
2 when we agreed to move, when we agreed to move the cutoff
3 date from June to November, our advisory specifically,
4 both parties wanted to retain the right to remove
5 custodians, to change search terms because there would be
6 new custodians that needed to be added, different terms,
7 and there would be custodians that did not need to be
8 there anymore.

9 THE COURT: I get all that. I think what I heard
10 Mr. Dunnam say is, there's some custodians, even in that
11 new timeframe, that Baylor agrees are appropriate.

12 MS. SPRINGER: And we've started that.

13 THE COURT: And there are search terms that --
14 you know, there's gotta be some universe of custodians and
15 search terms from the old group that Baylor itself agrees
16 yeah, these are still appropriate. Start running that.

17 MS. SPRINGER: We --

18 THE COURT: Generate that -- those search terms,
19 generate those materials and start working.

20 MS. SPRINGER: We have and we've done it for the
21 post-June 15th timeframe. So on that we are. But as I
22 understood what Mr. Dunnam was saying is, he wanted us to
23 run all of the agreed search terms from the old order and
24 on all of the custodians, and the problem is, the lessons
25 learned from the old order is some of those generated

1 massive amounts of hits.

2 THE COURT: Well, I don't know if that's what he
3 was saying or not but --

4 MR. DUNNAM: No. We -- I think -- Ms. Johnson's
5 been working on this, too -- that we have a list of things
6 we've agreed proposed, and we might have some things that
7 we don't agree. But why can't we go ahead and get the
8 stuff that we've agreed on.

9 MS. SPRINGER: That's --

10 THE COURT: That's what I'm saying.

11 MS. SPRINGER: And --

12 THE COURT: Whether he's saying it or not, what
13 I'm suggesting is, if there's stuff that you already have
14 agreed on that you're not going to ask me about and that
15 you don't even need to confer any further on, start that
16 work.

17 MS. SPRINGER: Judge, even before Wednesday, we
18 had the Baylor people going in, collecting the data
19 through the November time period to do exactly that.

20 THE COURT: Okay.

21 MS. SPRINGER: So we are there on that.

22 I would say on the proposal we got yesterday, it
23 is just search terms. It has no custodians, it has no
24 date ranges. So we need to --

25 MR. DUNNAM: We're going to do that. We had

1 promised you, I think, that by tomorrow -- yesterday. So
2 we --

3 MS. SPRINGER: Okay. I just --

4 MR. DUNNAM: Yeah.

5 THE COURT: My order today is going to give you a
6 deadline to give all of that to Baylor so that you all can
7 look at it and respond, and then, a deadline for you to
8 then submit stuff to me if you can't agree.

9 MR. DUNNAM: Yeah. I --

10 MS. SPRINGER: Really, in the interest of going
11 forward, because I don't want to be in a position where
12 I'm not in a position to address things fully the Court
13 may want to hear or may be brought up, I'm going to
14 suggest that we try to agree on a process where we alert
15 each other of issues like that.

16 THE COURT: I wouldn't worry about that. This
17 was a hearing I called that, you know, I didn't give y'all
18 any notice of what was going to be talked about. So yeah.
19 No harm, no foul at this point.

20 MS. SPRINGER: Okay. Because I have not been as
21 deeply involved in the prior years --

22 THE COURT: Understood.

23 MS. SPRINGER: -- in the case.

24 THE COURT: Understood. All right.

25 So you'll get an order from me today on the other

1 matters that were still lingering. What I would ask you
2 to do is work with that vendor and communicate, if you
3 could, with Ms. Deichert, my courtroom deputy, about a
4 date. Can we all agree in Austin, or do you need to do it
5 in -- I mean, I've just been doing stuff here without even
6 asking.

7 MR. DUNNAM: Well, I think in this instance, I
8 think we have to do it by phone because I believe the
9 vendors person is -- I mean, obviously we can compel the
10 vendors person to come here but --

11 THE COURT: No. By phone is fine.

12 MR. DUNNAM: Okay. Yeah. They're in New Jersey.

13 THE COURT: Okay.

14 MR. DUNNAM: So we'll get with the vendor and get
15 some available dates and get with Ms. Deichert, as I
16 understand.

17 THE COURT: And the goal is to do this posthaste.
18 So next week at the latest.

19 MS. SPRINGER: And the vendor and possibly a
20 representative of PWC --

21 THE COURT: If you want to get a PWC
22 representative on the phone with y'all, that's fine with
23 me. And if there's any IT folks that you want to have,
24 you know, on your side, that's fine, as well.

25 MS. SPRINGER: They're going to know what --

1 PWC's going to know what the data looks like.

2 THE COURT: Sure. Makes sense. Okay. All
3 right. Thank y'all. You may be excused.

4 And just for the record, we're still on the
5 record, everything that was given to me, which is Exhibit
6 1, 2 and 3, are all going to be admitted for purposes of
7 this hearing.

8 Any -- that means that they'll be on the CM/ECF.
9 Anything about any of this that's -- needs to be sealed or
10 -- yeah. I didn't think so. All right. Thank you.
11 Y'all may be excused.

12 (Proceedings conclude at 11:17 a.m.)
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REPORTER'S CERTIFICATE

I, LILY I. REZNIK, DO HEREBY CERTIFY THAT THE FOREGOING
WAS TRANSCRIBED FROM AN ELECTRONIC RECORDING MADE AT THE
TIME OF THE AFORESAID PROCEEDINGS AND IS A CORRECT
TRANSCRIPT, TO THE BEST OF MY ABILITY, MADE FROM THE
PROCEEDINGS IN THE ABOVE-ENTITLED MATTER, AND THAT THE
TRANSCRIPT FEES AND FORMAT COMPLY WITH THOSE PRESCRIBED BY
THE COURT AND JUDICIAL CONFERENCE OF THE UNITED STATES.

/s/Lily I. ReznikNovember 4, 2020

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